No. 2818

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY KALEIALII et al.,
Plaintiffs in Error,

vs.

HENRIETTA SULLIVAN et al.,
Defendants in Error.

ANSWER OF DEFENDANTS IN ERROR TO REPLY BRIEF OF PLAINTIFFS IN ERROR.

S. H. DERBY,
Of Counsel for Defendants in Error.

Filed this.....day of January, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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On oral argument counsel for plaintiffs in error expressly stated that there was no question at all as to Robert Boyd's illegitimacy, and that, as to Mary Kaleialii, there was merely some doubt. He claimed, however, that as § 3248 of the Revised Laws of Hawaii permitted an illegitimate to inherit from its mother the plaintiffs must still prevail. He has since apparently discovered that the law aforesaid has no application to this case and, therefore, he *now* takes the surprising position that there is no evidence even tending to show illegitimacy. We trust that the court will sufficiently remember the oral argument to

appreciate this change of front, and we shall now deal briefly with the new issue advanced.

No cases are cited in the reply brief, but counsel offers for consideration some carefully selected passages from a text writer, which cannot be intelligently read apart from their context. It should also be remembered that the same author *later* states (on p. 458) that, if no sexual intercourse between the husband and wife is shown, a large variety of circumstances may be considered to rebut the presumption of legitimacy. As far as Hawaii is concerned, however, the whole matter is settled by the case of *Godfrey v. Rowland,* 16 Haw. 377, 386-387, where the court says:

> "Defendants' instruction numbered fifteen is correct. It is not necessary for the defendant to go so far as to show that there was no possibility of access between Frank and Alice at or near the time of the child's conception in order to make competent proof of the child's illegitimacy.
>
> It was once held that the presumption of legitimacy, if the husband by possibility could have had access to the wife, could not be disproved; the early rule being that if the husband was 'within the four seas' the child was legitimate and the contrary could not be shown. Later, it was held that if the fact of marriage has been proved, nothing can impugn the legitimacy of the issue short of proof of facts showing it to be impossible that the husband could be the father. Patterson v. Gaines, 6 How. 550. The point actually decided in Patterson v. Gaines, however, was that a child could not be bastardized by the mere declarations of the father. In Phillips v. Allen, 2 Allen 453, it was held that the presumption of legitimacy can only be rebutted by evidence which proves beyond all reasonable doubt that the husband could not

have been the father. These cases show a survival of a trace of the old *quatuor maria* idea. We understand the modern rule to be that proof of non-access need not go to the extent of showing the impossibility of the husband being the father; neither is it necessary that the proof should be clear beyond every reasonable doubt. If it is once held that the presumption may be rebutted at all, there seems to be no logical reason why the fact of illegitimacy should be required to be proved in any other manner than is any other fact in a court of justice. This seems to have been the view of the House of Lords in Morris v. Davies. On page 244, Lord Cottenham said, 'the argument for the appellant assumes as a rule of law, that no evidence is admissible to disprove sexual intercourse having taken place, where the opportunity is proved to have existed, the husband and wife being proved to have been within the same house. This is very like attempting to establish a doctrine of *intra quatuor muros,* instead of the exploded doctrine of *quatuor maria.* But it is admitted that the parties may be followed within these four walls, and the fact of sexual intercourse not only disproved by direct testimony, but by circumstantial evidence raising a strong presumption against the fact. If so the principle does not stand on any positive rule of law, *but upon evidence of the fact as to which the ordinary rules of evidence must be applied.'* And again on page 260 it is said the presumption stands until encountered by such evidence as proved *to the satisfaction of those who are to decide the question* that sexual intercourse did not take place. And on page 261 'that it is the duty of a jury and your Lordships to weigh the evidence against the presumption and to decide according as, in the exercise of free and honest judgment, either may appear to preponderate'.'' (Italics those of the court.)

In the case at bar Mary Kaleialii, who always lived with her mother till her marriage (Tr. pp. 83-85) and

who was much older than her brother Robert (Tr. 87, 88), testified that she never knew Mr. Stone and had only heard about him, and it is somewhat surprising to have it suggested that this is not some evidence of non-access and that he was not Robert's father. And, as far as she herself is concerned, we have her repeated *admissions* on the subject as well as numerous other facts referred to on page 4 of our supplemental brief.

We submit that on the evidence in this case no judge or jury could reasonably reach any conclusion other than that Mary and Robert were both illegitimate. As previously pointed out in our supplemental brief, however, the question is not whether such is a *necessary* conclusion, but whether there is *any* evidence to support the same, as in such case the judgment cannot be disturbed. The explanation that Mary Kaleialii became confused in giving her evidence is hardly a satisfactory reply to this contention.

On the last page of the reply brief counsel calls attention to the fact that the interests of the plaintiffs were acquired by *purchase* and not by *inheritance,* and then cites a statute permitting illegitimates to *inherit* from their mother—a strange confusion of reasoning. If the deed from Alexander Adams, Jr., gave a remainder to Peke's "children" (as we believe it clearly did not), that term would only apply to *legitimate* children and their right of inheritance from Peke would be immaterial, for, if she took only a life estate, there was nothing to inherit. On plaintiffs' construction, if there were no children, i. e., no legiti-

mate children, the property was to revert to Alexander Adams, Jr., and his heirs, and plaintiffs cannot claim through him because they are not his heirs (*Machado v. Kualau,* 20 Haw. 722).

We, therefore, again submit that, even if plaintiffs' construction of the deed should prevail, they still have no claim to the property and the judgment should be affirmed.

Dated, San Francisco,
January 2, 1917.

Respectfully submitted,

S. H. Derby,

Of Counsel for Defendants in Error.